

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ABC PAVING COMPANY,

Plaintiff-Appellant,

v

JENKINS CONSTRUCTION, INC.,

Defendant-Appellee.

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UNPUBLISHED

March 8, 2007

No. 270573

Wayne Circuit Court

LC No. 05-535851-CK

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition in favor of defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In January 1996, the parties entered into a subcontracting agreement whereby plaintiff would be responsible for the excavation work on a construction project at Rosa L. Parks Middle School in Detroit. Plaintiff's last day of work on the project was April 3, 1997. On December 16, 2005, plaintiff filed the instant action alleging that defendant had failed to pay \$122,691 for work on the project. Defendant submitted affidavits and other documentary evidence showing plaintiff's last day of work (April 3, 1997), the date of plaintiff's last pay application (November 22, 1996), and the last date of payment (February 20, 1997). Plaintiff admitted its last day of work was April 3, 1997 and did not rebut the evidence regarding its invoicing. Plaintiff served the single set of interrogatories involved in this case on defendant on January 13, 2006. Defendant filed a motion for summary disposition on February 14, 2006. Pursuant to a stipulated order to compel, defendant answered the interrogatories on March 7, 2006. The trial court granted summary disposition to defendant on the ground that the action was barred by the statute of limitations.

Plaintiff first argues that the grant of summary disposition pursuant to MCR 2.116(C)(7) and MCL 600.5807(8) was improper because the invoicing section of the contract allegedly delayed defendant's obligation to pay plaintiff until it received payment from the school district and because the date that defendant received final payment from the school district is unknown. Both a grant of summary disposition and the issue of whether a claim is precluded by the statute of limitations are reviewed de novo. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997).

Summary disposition is appropriate when there is no material issue of fact. *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). A trial court must construe the pleadings in favor of the nonmoving party and may also consider affidavits and documentary evidence. *Id.* In the present case, plaintiff admitted that its last day of work was April 3, 1997 and submitted no documents rebutting those presented by defendant showing that plaintiff had been paid pursuant to its last invoice. Given these facts, the trial court properly determined as a matter of law when the claim for payment on the contract accrued.

A grant of summary disposition can be inappropriate if the trial court misapplied the law, such as the rules governing the accrual of a contract claim. A claim for breach of contract accrues when the “wrong upon which the claim is based” occurs. *Scherer v Hellstrom*, 270 Mich App 458, 463; 716 NW2d 307 (2006). The statute of limitations that applies to contract claims is six years. MCL 600.5807(8). Plaintiff finished its work on the contract on April 3, 1997 and, according to the terms of the contract, should have filed its invoice for that work on April 20, 1997. It did not file the instant lawsuit until December 16, 2005. Given that eight years elapsed between the time that plaintiff finished work and should have submitted its invoice and the time it filed its claim, the trial court properly held that the action was barred by the statute of limitations.

Plaintiff’s argument based on *Berkel & Co Contractors v Christman Co*, 210 Mich App 416; 533 NW2d 838 (1995), is flawed. In *Berkel*, this Court held that a “pay-when-paid” clause in a construction contract is enforceable and that a claim for payment under a contract containing such a clause does not accrue until the general contractor gets paid for the work done by the subcontractor. The clause plaintiff relies on is not a “pay-when-paid” clause, however. In *Berkel*, the contract stated that “the receipt of such payments [from the owner] by Christman Company [the general contractor] being a condition precedent to payments to the subcontractor.” *Id.* at 419. In the present contract, there is no conditional language of the type in the *Berkel* case. The parties’ contract states merely that the general contractor “shall pay” the subcontractor “within seven (7) days” of its receipt of payment from the owner. This language is more in the nature of delineating a time for payment than a condition precedent to payment.

Even if the invoicing provision were a “pay-when-paid” clause, plaintiff’s reliance on *Berkel* would be misplaced. In *Berkel*, the general contractor never got paid whereas in the present case, defendant received payment for every invoice submitted by plaintiff and forwarded that payment to plaintiff. While plaintiff did some work after the date of its last check from defendant, it did not file a pay application for that work and made no claim for payment until the current action. Under these circumstances, we conclude that plaintiff cannot use the “pay-when-paid” clause to keep its cause of action alive.

Plaintiff also challenges the trial court’s refusal to grant its motion for default judgment based on defendant’s alleged discovery abuses. Plaintiff contends that defendant’s answers to its interrogatories were evasive and thus in contravention of the court order.

A trial court’s decision regarding a motion for default judgment under MCR 2.313 is reviewed for an abuse of discretion. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 397; 484 NW2d 718 (1992). A trial court is permitted to enter a default judgment against a party as a sanction for discovery abuses. *Id.* at 396. However, this is a drastic measure and should only be used with caution. *Id.* Factors to consider in determining whether default is appropriate

include whether discovery abuses occurred over a long period of time, whether there were multiple abuses, and whether the abuses were flagrant and intentional. *Id.* at 396-397.

In the present case, the entire discovery process lasted less than a month, so it cannot reasonably be argued that the abuses extended over a long period of time. Additionally, there was only one alleged abuse and it did not involve dishonesty to either the court or plaintiff. Contrary to plaintiff's argument, granting the motion for default judgment on these facts would have been unreasonable and, thus, the trial court did not abuse its discretion by denying the motion.

We affirm.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ Kurtis T. Wilder